No. 10173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. BERLIN and C. T. RUSSELL,

Appellee.

Upon Appeal From the District Court of The United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE APPELLANT

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JURISDICTION

This matter has been covered in the opening brief for the appellant and since there is no dispute between the parties as to this question, it would serve no purpose to repeat the statements therein made at this time.

STATEMENT OF THE CASE

The agreed statement of the case has been set forth in the opening brief for the appellant and since there is no dispute between the parties as to the facts in this case, it would serve no purpose to repeat them at this time.

QUESTION INVOLVED

Did the appellee, by having in its employ eight or more employees on each week during the period from January 1, 1941, to May 16, 1941, qualify as an "employer" as that term is defined in Section 9(a) of the California Unemployment Insurance Act?

STATUTES INVOLVED

The statutes involved, namely, Section 9(a), Section 37, Section 38, and Section 90 of the California Unemployment Insurance Act, have been set forth in the opening brief for the appellant and it would serve no purpose to repeat them at this time.

STATEMENT OF POINTS TO BE URGED

The appellee was an "employer" during the year 1941 within the meaning of the provisions of Section 9(a) of the California Unemployment Insurance Act.

ARGUMENT

I

THE APPELLEE WAS AN "EMPLOYER" WITHIN THE MEANING OF THE PROVISIONS OF SECTION 9(a) OF THE CALIFORNIA UNEMPLOYMENT INSURANCE ACT FOR THE YEAR 1941

Under Section 9(a) of the California Unemployment Insurance Act, the appellee qualified as an "employer" for the year 1941 if for *some portion* of a day in each of twenty *different* weeks *within the calendar* year it had four or more individuals in its employ.

The period commencing Sunday, January 5, 1941, and ending Saturday, May 10, 1941, includes 18 weeks. It is admitted that appellee had four or more employees on some day in each of those weeks. On January 2 and 3, 1941, it is agreed that the appellee had four or more employees. These days certainly were in a different week from the following 18 weeks. It is agreed that appellee had four or more employees on May 12, 13, 14, 15, and 16, 1941. Certainly these days were in a different week from the preceding 18 weeks. Every day must be in some week. The additional days at each end of, but not within, the 18 week period must have been in two additional weeks. Consequently there were 20 days, each in a different week, during which the appellee had four or more employees in 1941.

It was contended by the appellee, and so decided by the District court, that each of the 20 days must fall in a different *complete calendar* week within the year 1941. It is submitted that such a construction adds an entirely new factor not found in the definition in Section 9(a). The statute does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. If the Legislature had so intended, it very easily could have said so. In fact, the failure of the Legislature to prescribe that the 20 days in a calendar year must fall within 20 *complete calendar weeks,* indicates a definite legislative intent that an employing unit is an employer if it has four or more individuals in its employ on 20 days in the calendar year, each day falling in a different week, irrespective of how many days there are in such week.

To support its contentions, the appellee stresses the language of that portion of Section 9(a) which states "in each of 20 different weeks" and "within the current calendar year", completely ignoring however that portion of the section which is in reality the controlling portion, namely, "for some portion of a day."

As the appellee so aptly states the "Legislature could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province." (Page 10, Brief for Appellee.) However, "by the same token the lines

of demarcation so laid down (by the Legislature) must be strictly observed * * *." (Page 11, Brief for Appellee.)

Here the Act nowhere prescribes employment of four or more individuals during 20 or more complete calendar weeks during one calendar year; instead, it clearly and unequivocably states "for some portion of a day * * * in each of 20 different weeks * * * within the calendar year." Since the statute is clear and unambiguous we submit that since the appellee admittedly had four or more employees for some *portion of a day* in each of 20 *different* weeks within the calendar year, the appellee is an "employer" under Section 9(a) of the Act.

We respectfully call to the court's attention that there is another case pending before this court, numbered 10049 and entitled "*United States of America, Appellant,* vs. *Berlin and Russell Aircraft Machine and Manufacturing Company, a copartnership, Charles T. Russell and Intercontinental Aircraft Corporation, Appellee.*" Said case involves the same issues under the Federal Unemployment Tax, Section 1607(a) of the Internal Revenue Code. The record shows that case has been set for hearing before this court on October 15, 1942, which is the same day for the hearing in the case at bar.

CONCLUSION

The decision of the District Court, holding the appellee was not an "employer" under Section 9(a) of the California Unemployment Insurance Act and disqualifying appellant's claim was erroneous and should be reversed.

Respectfully submitted.

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